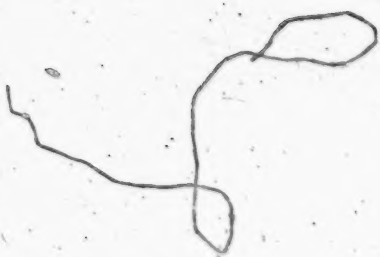

FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 17 1942
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941

NOS. ~~819 AND 820~~ 7-8

IN THE MATTER

of

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,

Debtor.

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS COMMITTEE,

Petitioners,

vs.

A. C. JAMES CO., and others,

Respondents,

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under The Western Pacific Railroad Company First Mortgage, dated June 26, 1916,

Petitioners,

vs.

A. C. JAMES CO., and others,

Respondents.

BRIEF OF A. C. JAMES CO., RESPONDENT, IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI.

ROBERT E. COULSON,
Attorney for
A. C. James Co., Respondent.

HORACE E. WHITESIDE,
Of Counsel.

New York, N. Y.
January 17, 1942.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES.

STATUTES.

RULES.

Supreme Court of the United States

OCTOBER TERM, 1941

NOS. 819 AND 820

IN THE MATTER

of

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,

Debtor.

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS COMMITTEE,

Petitioners,

vs.

A. C. JAMES CO., and others,

Respondents,

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under The Western Pacific Railroad Company First Mortgage, dated June 26, 1916,

Petitioners,

vs.

A. C. JAMES CO., and others,

Respondents.

BRIEF OF A. C. JAMES CO., RESPONDENT, IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

These are separate applications by the Institutional Bondholders Committee and by the Trustees of the First Mortgage of the Debtor for a writ of certiorari to review

a decree of the United States Circuit Court of Appeals for the Ninth Circuit entered November 28, 1941, reversing an order of the United States District Court for the Northern District of California, Southern Division (Tr. 1600).

The District Court in a proceeding under Section 77 of the Bankruptcy Act for the reorganization of The Western Pacific Railroad Company, the Debtor, had approved a plan of reorganization certified to it by the Interstate Commerce Commission. Respondent, A. C. James Co., together with other parties in interest, appealed from the decision of the District Court. Upon such appeal the Circuit Court of Appeals for the Ninth Circuit entered the decree here sought to be reviewed, reversing the action of the District Court and remanding the proceeding to the District Court with directions to dismiss it or, in the Court's discretion, and on motion of any party in interest, to refer it back to the Commission for further action.

Petitions for rehearing as to the decree, here sought to be reviewed by this Court, were filed with the Circuit Court of Appeals for the Ninth Circuit on December 19, 1941, by Irving Trust Company, as Trustee under the General and Refunding Mortgage of the Debtor, and by counsel for the Debtor on December 23, 1941. These petitions for rehearing are, as we are presently advised, still pending before that Court.

Opinions Below

The opinion of the Circuit Court of Appeals, dated November 28, 1941 (Tr. 2663), reversing the District Court, has not yet been officially reported. For the convenience of the Court this opinion is printed in the appendix to this brief. The opinion of the District Court

is reported at 34 F. Supp. 493 and printed at pages 1569 to 1600 of the Transcript.

Status of Respondent, A. C. James Co.

This respondent, A. C. James Co., is a secured creditor of the Debtor in the principal amount of $4,999,800. With accrued and unpaid interest to January 1, 1939, its claim amounted to $6,249,750. The debentures which originally represented the claim were acquired by the respondent at public offerings in 1931 and 1932 and payment was made for such securities in cash at 100 cents on the dollar for the principal amount of the loan. The collateral notes which now represent the claim were received in exchange for the debentures in 1932 and are secured by General and Refunding Mortgage Bonds of the Debtor (Tr. 1084-5). Both the secured notes and the General and Refunding Mortgage Bonds were approved by the Interstate Commerce Commission under Section 20(a) of the Interstate Commerce Act at the time they were acquired by respondent. The funds advanced by this respondent were used by the Debtor for the construction of its Northern California Extension, a line connecting the lines of the Debtor with those of the Great Northern Railway Company. The operation of this Northern California Extension has largely and progressively increased the earning power of the Debtor (Tr. 1077-1078).

Under the plan of reorganization for the Debtor, which was certified by the Commission to the District Court, the secured claim of this respondent was recognized only in part. Taking the value of common stock without par value at $57.00 per share, the basis on which it was allocated to First Mortgage bondholders under the proposed plan,

approximately 58% of the claim of respondent was cancelled and not funded under the proposed plan of reorganization. Even at a value of $100 per share for the common stock without par value (a basis sometimes referred to by the Commission in its Reports) approximately 33% of the claim of respondent was cancelled and not funded.

The Commission found that the securities given the respondent were inadequate to satisfy its claim (Tr. 269) but it did not find the extent of the deficiency and it made no definite finding as to the value of the proposed common stock without par value or of the value of the equity represented by such common stock without par value. The Commission made no finding of value of the Debtor's property as a whole nor of the part of it subject to the lien of the General and Refunding Mortgage. The Commission and the District Court also failed to make findings as to other important matters, without which findings the fairness of the plan cannot be determined.

Limited Scope of Decision Below

The proposed plan of reorganization before the District Court was not a plan agreed upon by the parties in interest. It was formulated by the Bureau of Finance of the Interstate Commerce Commission, and promulgated by the Commission. It has not yet been submitted to the creditors for a vote of acceptance or rejection as required by Section 77 of the Bankruptcy Act.

Moreover, the decree of the Circuit Court of Appeals is, in a basic sense, interlocutory and preliminary only. The appeals from the decision of the District Court, which were filed by this respondent and other parties at interest,

raised a number of substantive and important questions with relation to the proposed plan, including questions as to the respective coverage of the liens of the First Mortgage and of the General and Refunding Mortgage of the Debtor, questions as to discrimination as between classes of secured creditors, and questions as to the preferential treatment of the Reconstruction Finance Corporation under the proposed plan. None of these questions were considered or passed upon by the Circuit Court of Appeals for the Ninth Circuit.

The reports and orders of the Interstate Commerce Commission, and the order of the District Court, approving the proposed plan, had been rendered prior to the issuance by this Court of its opinion in *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510, enunciating certain general principles applicable to corporate reorganizations, including the requirement that appraisal of the fairness of a plan of reorganization be based upon adequate valuation data and clear and definite findings.

The Circuit Court of Appeals for the Ninth Circuit, in the decree here sought to be reviewed, held that the Commission had failed to make the necessary valuation findings and factual determinations which would enable the Court to properly consider and pass upon the question whether the plan was fair and equitable as against the objections urged before it.

The crux of the decision here sought to be reviewed is set forth in the following language (Appendix, p. xiv):

> "Lacking the requisite valuation data, the court was in no position to exercise the 'informed, independent judgment' which appraisal of the fairness of a plan of reorganization entails. Consolidated Rock Products Co. v. Du Bois, supra. See, also,

National Surety Co. v. Coreill, 289 U. S. 426, 436; First National Bank v. Flershem, 290 U. S. 504, 525; Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 115. Therefore, instead of approving the plan, the court should have entered an order dismissing the proceeding or, in its discretion and on motion of any party in interest, referring the proceeding back to the Commission for further action."

In language and in substance, the decision of the Circuit Court of Appeals, here sought to be reviewed, follows the clear and complete statement of principles laid down by this Court in *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510, 520. The decision entered by this Court on December 22, 1941 in *National Labor Relations Board*, v. *West Virginia Electric & Power Co.*, 62 Sup. Ct. 344, remanding a proceeding to an administrative agency for clear and adequate findings as to essential factual elements, is closely analogous.

Summary of Argument.

In this brief we seek to confine ourselves to a statement of the reasons why this Court should deny certiorari. Substantial portions of the petitions for certiorari and briefs, especially that on behalf of the Institutional Bondholders Committee, seem to us irrelevant upon the question whether a writ of certiorari should issue, and we refrain from discussion of such matters.

We do not, for instance, enter into any discussion of the merits or demerits of the proposed plan of reorganization which was certified to the District Court by the Commission. Suffice it to say that, if the Commission had supported the proposed plan by definite determinations, consistent with the proposed plan, of the prospective earn

ing power of the Debtor's property and of its value based on such earning power (which it clearly failed to do), such determinations would already have been proved inaccurate by the demonstrated earning power of the property, and this not solely because of war conditions but, for the most part, because the construction of the Northern California Extension, referred to above, the building of the Dotsero Cut-off, and certain other definite factors, have completely changed the economic status of the property and greatly increased its real earning power.

We shall here discuss primarily the following propositions:

1. The decision below is not in conflict with any decision of another Circuit Court of Appeals, or with decisions of this Court.

2. The decision below does not raise for the first time any important questions of Federal law or public importance, but, on the contrary, is well within the principles clearly enunciated by this Court, in affirming the Ninth Circuit in the *Consolidated Rock Products Co.* case, which are, in respects herein involved, as applicable to a proceeding under Section 77 of the Bankruptcy Act as to a proceeding under Chapter X of the Bankruptcy Act.

3. A consideration by this Court of the decree below is definitely premature since (a) the proposed plan under consideration by the Commission and the District Court has not yet been submitted to the creditors for a vote of acceptance or rejection under Section 77, and may never become effective, and (b) a consideration of all aspects of the plan would require this Court to review a record of 2,677 pages and many questions, including questions of local law, which have not yet been passed upon by the courts below.

4. The assessing of costs of appeal by the Circuit Court of Appeals against the appellees below, stressed by both petitioners herein as a ground for review, is not a matter of public interest, is in harmony with normal appellate procedure and the recoupment of such costs by the petitioners is adequately provided for under Section 77 of the Bankruptcy Act.

POINT I.

The decision below is not in conflict with any decision of another Circuit Court of Appeals, or with decisions of this Court.

At the outset it should be noted that the Commission reports of October 10, 1938 and of June 21, 1939 approving a proposed plan of reorganization for the Debtor were formulated and released before the decision of this Court in *Consolidated Rock Products Co.* v. *Du Bois, supra,* and before the decision of this Court in *Case v. Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106. Also it should be noted that the order of the District Court approving the proposed plan in this proceeding was made before the decision of this Court in the *Consolidated Rock Products Co.* case.

We have not examined the records in the numerous proceedings under Section 77 of the Bankruptcy Act, referred to in the petition and brief on behalf of the Institutional Bondholders Committee as having been approved by District Courts. We find it difficult, however, to accept the rather dramatic language used in the brief of the First Mortgage Trustees (p. 14) that the decision of the Circuit Court of Appeals in the instant case "fell like a bombshell." It had, we think, been entirely clear to all persons

concerned with railroad reorganizations under Section 77 that those plans which had been certified by the Interstate Commerce Commission prior to the decisions of this Court in *Case* v. *Los Angeles Lumber Products Co., Ltd. supra,* and *Consolidated Rock Products Co.* v. *Du Bois, supra,* failed to meet the standards as to recognition of absolute priorities and definite findings of value required by the above-mentioned decisions of this Court. The decision of the Circuit Court of Appeals in the instant case was not only necessary but was inevitable.

We are advised that the issue of inadequate findings has been passed upon by a Circuit Court of Appeals in connection with only one other proposed plan for the reorganization of a railroad under Section 77 of the Bankruptcy Act. *In the Matter of Chicago, Milwaukee, St. Paul & Pacific Railroad Co., Debtor,* not yet reported.

The Circuit Court of Appeals for the Seventh Circuit in its opinion of December 4, 1941, in that case arrived at the identical result reached by the Ninth Circuit in the instant case. The plan of reorganization there under consideration was remanded to the District Court and to the Commission for necessary findings.

After pointing out that the Commission did not, at the time of its report, have available for its guidance the decision of the Supreme Court in *Consolidated Rock Products Co.* v. *Du Bois, supra,* the Circuit Court of Appeals for the Seventh Circuit said, at pages 19 to 20 of its opinion:

> "As to the necessity and character of the findings, the Court in the Consolidated Rock Products case spoke and the rule it announced applies to the I. C. C. in railroad reorganization as fully as it applies to the District Court in other reorganization cases. Save as

modified by Sec. 77 (e) the Commission should follow the opinion in that case.

"In the report of the Commission there is a discussion of the various factors which were deemed pertinent in its inquiry into values. Absent, however, were clear cut findings or values which are so essential to the intelligent approval of the plan. Our criticism is not directed to the fact that the findings were embodied in the Commission's report (a large part of which is devoted to a discussion and statement of the evidence) rather than stated specifically as findings. But the fault lies in the fact that we are left uncertain, or in the dark, as to the finding of the Commission. The evidence might support a finding of a larger or a smaller amount. Which should we accept? The fact finding body is the I. C. C. It must find. We cannot.

"Somewhat similar was the situation in the case of *Smith* v. *Illinois Bell Telephone Company*, 282 U. S. 162, a case which arose from a three judge district court in this circuit. In the absence of specific findings the Supreme Court set aside the decree and remanded the cause to make the necessary and appropriate findings. It refused to accept the conclusions of the District Court as inferential expressions of its fact conclusions. See also, *Public Service Commission* v. *Wisconsin Telephone Co.*, 289 U. S. 67; *United States* v. *Magnolia Petroleum Co.*, 276 U. S. 160, and *Universal Battery Co.* v. *U. S.*, 281 U. S. 580.

"The explicit holding of the Consolidated Rock Products case is so mandatory that further discussion is unnecessary. We can not accept the Commission's discussion of the evidence as a finding. Nor may we make findings, save where there is no dispute, or dispute is not serious, in order to sustain the plan."

While the petitioners have sought in their briefs to spell out a conflict between the decision here sought to be re-

viewed and the decision of the Seventh Circuit in the *Chicago, Milwaukee, St. Paul & Pacific Railroad Company* case, as well as with the *Consolidated Rock Products Company* case, itself, they are forced in this effort to superimpose some ingenious and extraordinary glosses on the language of the opinion of the Circuit Court of Appeals for the Ninth Circuit in the instant case. As a matter of fact, the language used in the Ninth Circuit opinion, here sought to be reviewed, follows almost verbatim the language used as to findings and determinations of value in the opinion rendered by this Court in *Consolidated Rock Products Co.* v. *Du Bois, supra.*

As an example of the extent to which the petitioners strained to create an appearance of conflict, note petitioners' attempt (Pet. No. 819 at pp. 30, 33; Pet. No. 820 at pp. 2, 8) to read into the decision of the Ninth Circuit a repudiation of the doctrine of absolute priority, in claimed conflict with the doctrines of *Northern Pacific Railway Company* v. *Boyd*, 228 U. S. 482, as amplified and applied in *Case* v. *Los Angeles Lumber Products Co., supra*, and *Consolidated Rock Products Co.* v. *Du Bois, supra.* As a matter of fact, the doctrine of absolute priority as laid down by this Court was accepted in its full scope by every party before the Circuit Court in the instant proceeding, and nothing in the opinion questions the rule.

The petitioners seek to characterize the Ninth Circuit requirement of adequate findings of value, both for the purpose of capitalization of the Debtor and for the allocation of new securities, as requiring "a precise mathematical formula based upon exact dollar values" (Pet. No. 820, p. 7) and would hold it inconsistent with the identical requirement of adequate findings in the *Consolidated Rock Products Co.* case. The conflict is illusory. The peti-

tioners establish only that the Commission's doctrine of "equitable equivalent" (Tr. 316; Pet. No. 819, p. 32; Pet. No. 820, p. 5) is wholly inconsistent with the requirement of adequate findings and determinations announced by this Court.

How the Commission can make the valuations which it is expressly empowered to make under Section 77 without expressing such values in dollars, and how, even though earning power be given primary weight, this dispenses with the dollar yardstick, is not clear. Even estimates of earning power must necessarily be expressed in dollars and cents. The fact is, that in financial reorganizations one is necessarily dependent on the dollar yardstick, and no amount of esoteric phrasing will establish that the simple requirement of necessary determinations of value by the Commission involves a disregard of the priorities rule.

An examination of the opinion of the Ninth Circuit, here sought to be reviewed, in comparison with the opinion of the Seventh Circuit in the *Milwaukee* case, discloses only one possible difference of view between the two forums. That difference, if it exists, is not important or material for present purposes, and could not serve as a proper basis for reversing either decree. The Ninth Circuit, in the instant case, states as a reason for requiring a valuation by the Commission of the properties, as a whole, of the Debtor, the need for determining whether the equity may fairly and equitably participate in the reorganization. The Circuit Court of Appeals in the Seventh Circuit, in the *Chicago, Milwaukee, St. Paul & Pacific Railroad Company* case, apparently accepts as adequate for its consideration of the plan before it, so far as the equity is concerned, findings by the Commission that such stock

is without value and seeks findings as to valuation of property only for the purpose of determining the interests of the various classes of creditors.

There is no necessary or inherent conflict of view between the two courts, even though the Circuit Court for the Ninth Circuit has asked for findings covering all essential elements of valuation prior to its consideration of any phase of the plan. In the case before the Ninth Circuit, it is obvious that the Commission must value the properties of the Debtor as a whole before the cancellation and rejection of a part of the claim of this respondent, a secured creditor, can be sustained by the courts as fair and equitable under the principles laid down in *Consolidated Rock Products Co.* v. *Du Bois, supra.* This phase of the problem the petitioners studiously ignore. In no event could this Court reverse the Circuit Court of Appeals for the Ninth Circuit as to the necessity for findings of value with reference to the treatment of this secured creditor, without reversing in part the doctrines which it has heretofore laid down clearly and explicitly in the *Consolidated Rock Products Co.* case.

Since each of the Circuit Courts of Appeals have decided that the analogous cases before them must go back to the Commission for lack of essential determinations of the value of the properties of the respective debtors, it matters little what minor differences of view they may have indicated as to the extent of inadequacy of the findings of the Commission shown by the respective records before them. This is not the sort of conflict which would properly invoke discretionary review by this Court.

A further alleged ground of conflict with the decisions of other Circuit Courts of Appeals and with decisions of

this Court is sought to be spelled out from the language used in the opinion of the Circuit Court of Appeals for the Ninth Circuit, as follows (Appendix, p. xvi):

> "In determining whether a plan of reorganization satisfies the requirements of subsection (e), the court is not concluded by any determination made by the Commission, but may, and must, exercise its own independent judgment; and this is true whether such determination relates to value or to some other subject. Initially, however, the duty of determining the value of any property for any purpose under §77 rests on the Commission, not on the court."*

The doctrine there laid down by the Circuit Court of Appeals for the Ninth Circuit differs only in phrasing from the doctrine laid down by the Circuit Court of Appeals for the Seventh Circuit in its opinion in the *Chicago, Milwaukee, St. Paul & Pacific Railroad Company* case, as follows (at p. 19):

> "It would be begging the question to assume that findings were necessarily made by the I. C. C. when the allocation was made. We would be delegating to the I. C. C. an obligation which is ours. The Commission must formulate its plan. It must make fact findings supported by the evidence upon which its plan is based. We must independently determine whether the plan is fair and equitable. In reaching our conclusion we must ascertain (a) whether there is evidence sufficient to support the findings and (b) we must be able to say that the findings support the plan, and (c) the plan is fair and equitable."

Under the long-established practice of this Court, such general expressions in an opinion are to be read in con-

---

* Each of the petitioners quotes this paragraph in part and omits the last sentence (Pet. No. 819, p. 23; Pet. No. 820, p. 9).

nection with the facts of the case and, except in such connection, are not controlling. *Cohens* v. *Virginia*, 6 Wheat. 264, 299; *Rathbun* v. *United States*, 295 U. S. 602, 627. When read in the light of the facts, the purport of the two statements is clear. Both are directed primarily to the basic requirement that the court, in determining whether a plan is fair and equitable, shall exercise an independent judgment. *Case* v. *Los Angeles Lumber Products Co., supra*; Bankruptcy Act, Sec. 77(e).

Even if the two statements may be taken as representing a difference of emphasis in the two circuits, one can scarcely invoke with propriety a review by this Court of extended records in complicated reorganization proceedings on the theory that two circuits may, at a later stage of each proceeding, when the Commission has made actual determinations as to the value of the properties of the Debtor, differ as to the weight to be given to the administrative findings. The problem is governed by the express provisions of Section 77 and this Court has heretofore expressed itself in numerous cases with complete definiteness and clarity as to the weight to be attributed to a finding of an administrative board as to a factual matter expressly referred to it by Congress. This Court may fairly assume that doctrines it has laid down will be followed by all Circuit Courts of Appeals dealing with proceedings under Section 77 of the Bankruptcy Act.

POINT II.

The decision below does not raise for the first time any important questions of Federal Law or public importance, but, on the contrary, is well within the principles clearly enunciated by this Court in affirming the Ninth Circuit in *Consolidated Rock Products Co.* v. *Du Bois*, which are, in the respects herein involved, as applicable to a proceeding under Section 77 of the Bankruptcy Act as to a proceeding under Chapter X of the Bankruptcy Act.

While it may be conceded that Section 77 of the Bankruptcy Act has not yet been fully construed by this Court in all its aspects, the question specifically decided by the Circuit Court of Appeals for the Ninth Circuit in the decision sought to be reviewed is not a question peculiar to Section 77 of the Bankruptcy Act, nor a question as to which if may fairly be said that there are not clear and definite rules of law laid down in prior decisions of this Court. Incidental to the growth of administrative tribunals during the past few decades, this Court has necessarily laid down at length the procedural requirements which must be met by administrative agencies in exercising fact-finding functions where private rights are fundamentally affected. *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railway Co.*, 294 U. S. 499; *Florida* v. *United States*, 282 U. S. 194; *Beaumont, Sour Lake & Western Railway Company* v. *United States*, 282 U. S. 74; *Interstate Commerce Commission* v. *Louisville and Nashville Railroad Company*, 227 U. S. 88.

Nothing can be clearer than that this Court has repeatedly and emphatically imposed upon administrative agencies, dealing with questions of the type dealt with

by the Interstate Commerce Commission in the instant proceeding, the rule that no amount of discussion or generalization can take the place of definite findings. Neither general conclusions in the language of the statute nor a choice between conflicting inferences will suffice. *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railway Co., supra*; *Florida* v. *United States, supra*; *Universal Battery Company* v. *United States*, 281 U. S. 580; *Smith* v. *Illinois Bell Telephone Company*, 282 U. S. 133.

District Courts are also required to act upon the basis of explicit findings as to essential facts. *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310; *Interstate Circuit, Inc.* v. *United States*, 304 U. S. 55; *Borden's Co.* v. *Baldwin*, 293 U. S. 194; *Public Service Commission of Wisconsin* v. *Wisconsin Telephone Company*, 289 U. S. 67; *Consolidated Rock Products Co.* v. *Du Bois, supra*; Rule 52, Rules of Civil Procedure.

A party to a proceeding, like the respondent here (a secured creditor), who finds a part of his claim confiscated, is entitled to know precisely and definitely the basis upon which this is done.

This Court should not exercise its discretionary right of review to bring before it the question whether a Circuit Court of Appeals may properly send back a proceeding to an administrative body with a request for definite findings upon questions essential to the sound determination of the legal issues presented.

POINT III.

A consideration by this Court of the decree below is definitely premature since (a) the proposed plan under consideration by the Commission and District Court has not yet been submitted to the creditors for a vote of acceptance or rejection under Section 77, and may never become effective, and (b) a consideration of all aspects of the plan would require this Court to review a record of 2,677 pages and many questions, including questions of local law, which have not yet been passed upon by the courts below.

Petitioners urge strongly that a speedy reorganization of the Debtor will be facilitated if this Court now reviews the reorganization proceeding upon the whole record (Pet. No. 819, pp. 40-43). Their contention is buttressed by a claim that the parties whom they characterize as "junior interests" have set up obstacles to a rapid reorganization. It seems unnecessary to make detailed answer to this suggestion of unnecessary delay since the recital of the proceedings contained in the brief of the Institutional Bondholders Committee shows that that Committee participated with other creditors in filing objections to the Commission's plan at each stage before the Commission and in the District Court, and only supported the plan in its entirety when it reached the Circuit Court of Appeals for the Ninth Circuit, where the basic objections of the so-called "junior interests" have been sustained.

Actually the reorganization of the Debtor can be expedited only by an immediate return of the proceeding to the Commission for the findings which are required by the general principles applicable to all reorganizations as laid down by this Court in *Consolidated Rock Products Co.* v.

Du Bois, supra. It is quite true that the Circuit Court of Appeals has failed to consider or pass upon numerous questions involved in the proceeding, including questions of local law. The position of the Circuit Court of Appeals is that, until the Commission has performed the task, expressly imposed upon it by Section 77, of making the requisite determinations as to the valuation of the property in its entirety and in its separate segments, the Court cannot go forward upon the task imposed upon it by Section 77.

As pointed out above, this conclusion of the Circuit Court of Appeals, as set forth in its decision, is entirely in accord with the well established principles enunciated by this Court in *Consolidated Rock Products Co.* v. *Du Bois, supra,* and *National Labor Relations Board* v. *West Virginia Electric & Power Company, supra.*

Many of the questions involved in a final determination of the fairness and equity of a plan require complicated factual determinations and some are questions of purely local law. There are, for instance, real and substantial questions involved in the proceeding as to the coverage of the First Mortgage and the General and Refunding Mortgage, respectively. These questions will, in normal course, be considered and passed upon by the District Court, after determinations and findings of value have been made by the Commission as to the properties in question. Only after the plan of reorganization has had full consideration by the Commission, by the District Court, and by the Circuit Court of Appeals, should a party to the proceeding be given leave to call upon this Court for a determination as to whether or not the Commission and the District Court, to whom primary jurisdiction is given by the statute, have failed in their statutory duties.

There is a further reason why review of this proceeding by this Court is necessarily premature. The plan under consideration in the reorganization proceeding has never been submitted to the creditors for a vote of acceptance or rejection as is specifically required by the express terms of Section 77(e) of the Bankruptcy Act. Under the statutory provisions a plan is necessarily inchoate prior to acceptance by the necessary percentage of creditors.

For this Court to remove from the normal course of orderly procedure and assume the burden of detailed consideration of an extended record as to a reorganization proceeding solely because a Circuit Court of Appeals has required further findings from an administrative agency, would be for this Court to assume, without compelling reason, the functions normally delegated to the inferior courts. *American Construction Company v. Jacksonville, Tampa and Key West Railway Company*, 148 U. S. 372, 384; *Hanover Star Milling Company* v. *Metcalf*, 240 U. S. 403, 408, 409.

POINT IV.

The assessing of costs of appeal by the Circuit Court of Appeals against the appellees below, stressed by both petitioners herein as a ground for review, is not a matter of public interest, is in harmony with normal appellate procedure and the recoupment of such costs by the petitioners is adequately provided for under Section 77 of the Bankruptcy Act.

Each of the petitioners for certiorari in this proceeding stresses the assessment of costs by the Circuit Court of Appeals against the unsuccessful parties in that Court as a ground for review of the proceeding (Brief for In-

stitutional Bondholders, pp. 43-44; Petition of the First Mortgage Trustees, p. 10). It is somewhat difficult to believe that this ground for review is urged with complete seriousness. While the costs and expenses of reorganization proceedings, even prior to the enactment of Section 77, have been matters of concern to the courts (*United States* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 282 U. S. 311; *Dickinson Industrial Site, Inc.* v. *Cowan*, 309 U. S. 382, 388), and while the very enactment of Section 77 may well have been motivated in part by problems arising in that field, it is difficult to see how the normal judicial procedure as to the assessment of costs (*Kansas City Southern Railway Company* v. *Guardian Trust Company*, 281 U. S., 1, 9) can be a ground for granting certiorari in this proceeding at this stage.

The Institutional Bondholders Committee is not a committee representing an entire class of security holders. It represents a group of insurance companies and one bank, which hold, in the aggregate, 34% of the Debtor's First Mortgage Bonds. These institutions are seeking to promote, quite properly, their proprietary interests, as holders of First Mortgage Bonds of the Debtor, in opposition to the interests of the secured creditors, who hold General and Refunding Mortgage Bonds as collateral, and other parties at interest. Such a group of litigants, acting in their own special interests, should be assessed normal costs like any other litigant.

Moreover, in view of the stress which the brief for the Institutional Bondholders Committee places upon its public service in "defending Commission proposals" (Pet. No. 819, p. 43), it is of interest to note that the District Court has already allowed to the Institutional Bondholders Committee the sum of $64,190.91 for their expenses up to

November 1, 1939, in connection with these proceedings and with the proposed plan of reorganization, including $50,000 for counsel fees. (*In re. Western Pacific Railroad Company*, 34 F. Supp. 493, at page 508.)

As to the First Mortgage Trustees, they are in a real sense volunteers in the proceeding. They have, throughout this proceeding, cooperated with the Institutional Bondholders Committee and urged the contentions of that Committee. This course has been at all times without any mandate, express or implied, from the remaining 66% of the First Mortgage bondholders, not members of the Institutional Bondholders Committee.

Here again it should be noted, however, that the District Court has already allowed these First Mortgage Trustees the sum of $32,554.11 up to November 1, 1939, to reimburse them for their services and expenses in these proceedings and in connection with the proposed plan of reorganization. (*In re. Western Pacific Railroad Company*, 34 F. Supp. 493, at page 508.)

It cannot be assumed that the Commission and the Court will be less liberal in the future, than in the past, with these petitioners as to the expenses involved in their participation. Certainly it cannot be said that the jurisdiction of this Court may properly be invoked at this stage of the proceeding to protect these petitioners from a present payment of costs in the Circuit Court of Appeals.

IN CONCLUSION.

For the several reasons above stated, it seems clear: (a) That there is no conflict between the decision of the Circuit Court of Appeals for the Ninth Circuit and the decisions of other Circuit Courts of Appeals or decisions of this Court as to any of the issues involved in the

decision here sought to be reviewed; (b) that the decision of the Circuit Court of Appeals is clearly in conformity with established principles of reorganization law, laid down by this Court in *Consolidated Rock Products Co.* v. *Du Bois, supra*; and (c) that any consideration by this Court of the entire proceeding would be premature, unduly burdensome, and would postpone rather than accelerate a final reorganization of the Debtor.

We further submit that the Circuit Court of Appeals for the Ninth Circuit has acted with complete propriety in remanding the proceedings to the District Court and to the Commission for consideration under the principles laid down by this Court in *Consolidated Rock Products Co.* v. *Du Bois, supra,* in view of the fact that consideration by the Commission and the District Court of the instant case antedated that decision by this Court and that essential determinations of value were not made by the Commission.

We respectfully urge that the petitions for certiorari should be denied.

Dated, New York, N. Y., January 17, 1942.

Respectfully submitted,

ROBERT E. COULSON,
Attorney for A. C. James Co.,
Respondent.

HORACE E. WHITESIDE,
of Counsel.

APPENDIX

Bankruptcy Act, § 77 (11 U. S. C. § 205).

* * * * * * * * * *

"(d) The debtor, after a petition is filed as provided in subsection (a), shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of August 27, 1935, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

"The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court.

"(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations

acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

"If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceeding under the provisions of subsection (d) of this section. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission there-

on or such a summarization thereof as the Commission may approve, and the opinion and order of the judge; Provided, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: Provided further, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency

or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

"Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: 'Provided, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): Provided further, That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the

officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: Provided further, That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

"If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts."

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 9714—Nov. 28, 1941

IN THE MATTER OF

THE WESTERN PACIFIC RAILROAD COMPANY,
Debtor.

THE WESTERN PACIFIC RAILROAD COMPANY,
Appellant,
vs.
RECONSTRUCTION FINANCE CORPORATION et al.,
Appellees.

IRVING TRUST COMPANY, Trustee,
Appellant,
vs.
RECONSTRUCTION FINANCE CORPORATION et al.,
Appellees.

THE WESTERN PACIFIC RAILROAD CORPORATION,
Appellant,
vs.
RECONSTRUCTION FINANCE CORPORATION et al.,
Appellees.

RAILROAD CREDIT CORPORATION,
Appellant,
vs.
RECONSTRUCTION FINANCE CORPORATION et al.,
Appellees.

A. C. JAMES COMPANY,
Appellant,
vs.
RECONSTRUCTION FINANCE CORPORATION et al.,
Appellees.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

Before DENMAN, MATHEWS and STEPHENS, Circuit Judges.

MATHEWS, Circuit Judge:

These appeals are from an order of the District Court[1] which, in a proceeding by The Western Pacific Railroad Company, a railroad corporation (hereafter called the debtor), under § 77 of the Bankruptcy Act, 11 U.S.C.A. § 205, approved a plan of reorganization which had been approved and certified to the court by the Interstate Commerce Commission.[2] The debtor has outstanding:

1. Trustees' certificates issued pursuant to paragraph (3) of subsection (c) of § 77 in the principal sum of $10,000,000. These certificates are owned and held by Reconstruction Finance Corporation.[3]

2. First mortgage 5% bonds dated June 26, 1916, due March 1, 1946, in the principal sum of $49,290,100, with accrued and unpaid interest thereon of $13,143,776—a total of $62,433,876—secured by a mortgage (hereafter called the first mortgage) of which Samuel Armstrong and Crocker First National Bank of San Francisco are trustees.

3. General and refunding mortgage 5% bonds (hereafter called refunding bonds) dated January 1, 1932, due January 1, 1957, in the principal sum of $18,999,500, secured by a mortgage (hereafter called the refunding mortgage) of which Irving Trust Company is trustee.[5] These bonds are pledged to secure payment of the notes hereafter mentioned. They have not been issued for any other purpose.

---

[1] 34 F. Supp. 493, 505-509.

[2] 233 I.C.C. 409, 441-455.

[3] 122 F. 2d 807.

[4] As of January 1, 1939, the effective date of the plan.

[5] Irving Trust Company succeeded The Chase National Bank as trustee on November 13, 1936.

4. Notes in the principal sum of $2,963,000, with accrued and unpaid interest thereon of $899,870 — a total of $3,862,870—secured by the pledge of refunding bonds in the principal sum of $10,750,000 and other collateral. These notes are owned and held by Reconstruction Finance Corporation.

5. Notes in the principal sum of $2,445,610, with accrued and unpaid interest thereon of $146,503[6] — a total of $2,592,113—secured by the pledge of refunding bonds in the principal sum of $4,000,000 and other collateral. These notes are owned and held by Railroad Credit Corporation.

6. Notes in the principal sum of $4,999,800, with accrued and unpaid interest thereon of $1,249,950—a total of $6,249,750—secured by the pledge of refunding bonds in the principal sum of $4,249,500 and other collateral. These notes are owned and held by A. C. James Company.

7. Unsecured indebtedness to The Western Realty Company in the principal sum of $50,000, with accrued and unpaid interest thereon of $11,667—a total of $61,667.

8. Unsecured indebtedness to The Western Pacific Railroad Corporation (hereafter called the holding company) in the principal sum of $5,768,791, with accrued and unpaid interest thereon of $1,980,429—a total of $7,749,220.

9. Six per cent preferred stock of the par value of $28,300,000 (283,000 shares of the par value of $100 each) owned and held by the holding company.

10. Common stock of the par value of $47,500,000 (475,000 shares of the par value of $100 each) owned and held by the holding company.

---

[6] These are the Commission's figures (233 I.C.C. 452). They differ slightly from those mentioned in the court's opinion (34 F. Supp. 497).

The plan provides, in effect, that the above mentioned securities and obligations shall be canceled and that, in lieu thereof, the reorganized company[7] shall issue new first mortgage 4% bonds dated January 1, 1939, due January 1, 1974, in the principal sum of $10,000,000, secured by a new first mortgage; income mortgage 4½% bonds (hereafter called income bonds) dated January 1, 1939, due January 1, 2014, in the principal sum of $21,219,075, secured by a so-called income mortgage; new 5% preferred stock of the par value of $31,850,297 (318,502.97 shares of the par value of $100 each); and 319,441 shares of new common stock without par value. These securities are to be distributed as follows:

To Reconstruction Finance Corporation, $10,000,000 of the new first mortgage bonds,[8] $1,185,200 of income bonds, $1,777,800 of new preferred stock and 15,788 shares of new common stock;[9] to the holders of first mortgage bonds now outstanding, $19,716,040 of income bonds, $29,574,060 of new preferred stock and 230,593 shares of new common stock;[10] to Railroad Credit Corporation, $154,111 of in-

---

[7]The reorganized company may be the debtor or a new corporation to which all assets of the debtor shall be transferred.

[8]Thus the $10,000,000 of receivers' certificates now held by Reconstruction Finance Corporation would be exchanged for new first mortgage bonds, dollar for dollar.

[9]Thus, for each $1,000 of indebtedness evidenced by notes now held by it, Reconstruction Finance Corporation would receive $306.82 of income bonds, $460.12 of new preferred stock and 4.087 shares of new common stock.

[10]Thus, for each $1,000 of indebtedness evidenced by first mortgage bonds now outstanding, holders thereof would receive $315.79 of income bonds, $473.69 of new preferred stock and 3.693 shares of new common stock.

come bonds, $241,681 of new preferred stock and 35,425 shares of new common stock;[11] to A. C. James Company, $163,724 of income bonds, $256,756 of new preferred stock and 37,635 shares of new common stock.[12] The Western Realty Company and the holding company are excluded from participation in the reorganization.

Objections to the plan were filed by the debtor, the refunding mortgage trustee, the holding company, Railroad Credit Corporation, A. C. James Company, The Western Realty Company and a bondholders' committee[13] representing holders of some of the first mortgage bonds now outstanding. The objections were overruled and the plan was approved. The debtor, the refunding mortgage trustee, the holding company, Railroad Credit Corporation and A. C. James Company have appealed.

Neither the debtor nor the refunding mortgage trustee was adversely affected by the plan or by the order approving it. Hence neither of them was entitled to appeal. King v. Buttolph, 9 Cir., 30 F. 2d 769; Loomis v. Gila County, 9 Cir., 101 F. 2d 827; In re Western Pacific R. R. Co., 9 Cir., 122 F. 2d 807. Their appeals are therefore dismissed.

The holding company objected to the plan on the ground that it is not fair and equitable,[14] but is unfair and in-

---

[11]Thus, for each $1,000 of indebtedness evidenced by notes now held by it, Railroad Credit Corporation would receive $59.45 of income bonds, $93.24 of new preferred stock and 13.666 shares of new common stock.

[12]Thus, for each $1,000 of indebtedness evidenced by notes now held by it, A. C. James Company would receive $26.20 of income bonds, $41.08 of new preferred stock and 6.021 shares of new common stock.

[13]The committee consists of Frederick H. Ecker, John W. Stedman and Reeve Schley.

[14]Bankruptcy Act, § 77(e)(1), 11 U.S.C.A. § 205(e)(1).

equitable, in that it excludes the holding company from participation in the reorganization. The objection states that the debtor is not insolvent, but has property of a value greatly in excess of its liabilities. Obviously, if the statement is true, the holding company is entitled to participate in the reorganization, and its exclusion therefrom is unfair and inequitable. Thus, to determine the question raised by the holding company's objection, it was necessary to determine the value of the debtor's property as of the effective date of the plan—January 1, 1939. Consolidated Rock Products Co. v. Du Bois, 312 U. S. 510, 517-525.

Railroad Credit Corporation objected to the plan on the ground that it is unfair and inequitable, in that it discriminates unfairly in favor of Reconstruction Finance Corporation and the holders of first mortgage bonds now outstanding [15] A. C. James Company objected to the plan on the ground that it is unfair and inequitable, in that it discriminates unfairly in favor of Reconstruction Finance Corporation, Railroad Credit Corporation and the holders of first mortgage bonds now outstanding.[16]

That Reconstruction Finance Corporation, Railroad Credit Corporation, A. C. James Company and the holders of first mortgage bonds now outstanding should participate in the reorganization is conceded. Fairness requires that their participation should be in proportion to the value of their respective claims. The question raised by the objections of Railroad Credit Corporation and A. C. James Company was whether the plan complies with that requirement. To determine this question, it was necessary to determine, as of the effective date of the plan,

[15] See footnotes 8-11.
[16] See footnotes 8-12.

the value of (1) each of the claims of Reconstruction Finance Corporation,* (2) the claim of Railroad Credit Corporation, (3) the claim of A. C. James Company, (4) the claims of the holders of first mortgage bonds now outstanding, (5) the $10,000,000 of new first mortgage bonds, (6) the $21,219,075 of income bonds, (7) the 318,502.97 shares of new preferred stock and (8) the 319,441 shares of new common stock which the plan provides shall be distributed to said claimants.

To determine the value of the above mentioned claims, it was necessary to determine the value of (1) the debtor's entire property, (2) the property subject to the first mortgage now outstanding, (3) the $18,999,500 of refunding bonds pledged to secure the claims of A. C. James Company, Railroad Credit Corporation and Reconstruction Finance Corporation and (4) the other collateral pledged to secure each of said claims. To determine the value of the refunding bonds, it was necessary to determine the value of (1) the property subject to the refunding mortgage only and (2) the property subject both to the refunding mortgage and to the first mortgage now outstanding. This, of course, necessitated a determination as to which of the debtor's property is, and which is not, subject to each mortgage. Consolidated Rock Products Co. v. Du Bois, supra.

To determine the value of the new first mortgage bonds, income bonds, new preferred stock and new common stock mentioned above, it was necessary to determine the value of (1) the debtor's entire property, (2) the property which would be subject to the new first mortgage and (3) the property which would be subject to the income mortgage.

---

*Reconstruction Finance Corporation has two claims—one as holder of trustees' certificates, one as holder of the debtor's notes.

Subsection (e) of § 77 provides: "If it shall be necessary to determine the value of any property for any purpose under this section, the [Interstate Commerce] Commission shall determine such value and certify the same to the court in its report on the plan." In this case, as has been seen, it was necessary to determine the value of (1) the debtor's entire property, (2) each of the claims of Reconstruction Finance Corporation, (3) the claim of Railroad Credit Corporation, (4) the claim of A. C. James Company, (5) the claims of the holders of first mortgage bonds now outstanding, (6) the $10,000,000 of new first mortgage bonds, (7) the $21,219,075 of income bonds, (8) the 318,502.97 shares of new preferred stock, (9) the 319,441 shares of new common stock, (10) the property subject to the first mortgage now outstanding, (11) the $18,999,500 of refunding bonds pledged to secure the claims of Reconstruction Finance Corporation, Railroad Credit Corporation and A. C. James Company, (12) the other collateral pledged to secure each of said claims, (13) the property subject to the refunding mortgage only, (14) the property subject both to the refunding mortgage and to the first mortgage now outstanding, (15) the property which would be subject to the new first mortgage and (16) the property which would be subject to the income mortgage. It thus became the duty of the Commission to determine these values and certify them to the court. That duty was not performed.

Lacking the requisite valuation data, the court was in no position to exercise the "informed, independent judgment" which appraisal of the fairness of a plan of reorganization entails. Consolidated Rock Products Co. v. Du Bois, supra. See, also, National Surety Co. v. Coriell, 289 U. S. 426, 436; First National Bank v. Flershem, 290 U. S. 504, 525; Case v. Los Angeles Lumber

Products Co., 308 U. S. 106, 115. Therefore, instead of approving the plan, the court should have entered an order dismissing the proceeding or, in its discretion and on motion of any party in interest, referring the proceeding back to the Commission for further action.[18]

The District Court's opinion states (34 F. Supp. 501): "It cannot be gainsaid that the Commission knows all about the debtor, its property, its history, financial and otherwise, its traffic and revenue, and its financial structure. No official body in the country is better qualified by reason of experience, ability and specialized knowledge than is the Commission to find the ultimate facts as to the debtor in relation to any of the matters mentioned." The statement indicates a possible misconception. Subsection (e) of § 77 provides:

> "Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no

[18] Subsection (e) of § 77 provides: "If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action . . ."

objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge . . ."

In determining whether a plan of reorganization satisfies the requirements of subsection (e), the court is not concluded by any determination made by the Commission, but may, and must, exercise its own independent judgment; and this is true whether such determination relates to value or to some other subject. Initially, however, the duty of determining the value of any property for any purpose under § 77 rests on the Commission, not on the court.

Order reversed and proceeding remanded with directions to dismiss it or, in the court's discretion and on motion of any party in interest, refer it back to the Commission for further action.

(Endorsed:) Opinion. Filed Nov. 28, 1941. Paul P. O'Brien, Clerk.